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OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ARTHUR CALDERON, Warden, *Petitioner*,

v.

BENJAMIN WAI SILVA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

APPENDIX A

[Filed January 16, 1997]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN WAI SILVA,	No. 96-80269
Plaintiff-Respondent,	D.C. No. CV-90-03311-DT
v.	**ORDER**
ARTHUR CALDERON, Warden,	
Defendant-Petitioner.	

Before: REINRARDT, LEAVY and TASHIMA, Circuit Judges.

Because this court has held that the amendments to Chapter 153 of Title 28 of the United States Code contained in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, do not apply to cases filed in the federal courts prior to the Act's effective date of April 24, 1996, see Jeffries v. Wood, 1996 WL 730493 (9th Cir. Nov. 20,

1996), the Petition for Permission to Appeal is dismissed as moot.

PETITION FOR PERMISSION T
APPEAL DISMISSED.

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APPENDIX B

APPENDIX B

[Filed June 24, 1996]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BENJAMIN WAI SILVA,	) Case No. CV 90-3311 DT
	)
Petitioner,	) **DEATH PENALTY**
	)
v.	) ORDER DENYING
	) RESPONDENT'S
ARTHUR CALDERON,	) MOTION TO VACATE
Warden of California	) THE COURT'S PRIOR
State Prison at San	) ORDER GRANTING AN
Quentin,	) EVIDENTIARY
	) HEARING
Respondent.	)
	)

Background

1. Factual Summary.

After a trial by jury, petitioner Benjamin Wai Silva ("Silva") was convicted of murdering Kevin Thorpe, but acquitted of murdering his traveling companion Laura Craig. The jury also found four special circumstances true, although three of these were later found inapplicable or unconstitutionally vague. After a

penalty phase trial, also to a jury, Silva was sentenced to death.

The essence of the charges were that Silva and two accomplices, Joe Shelton and Norman Thomas, kidnapped the couple after they were seen at a gas station filling up their car with gas. The next day, Silva and Shelton killed Thorpe while Thorpe was tied to a tree. The evidence describing how Thorpe was killed came through testimony by Thomas as to statements made by Shelton. Thomas testified that after Thorpe was killed, the threesome were standing over a barrel in which some of Thorpe's belongings were being burned. During that time, Shelton described the facts surrounding the actual killing while Silva simply looked on and smiled. Most of the testimony regarding the murder came from Thomas' retelling of this incident.

Shelton was tried before Silva, convicted of murdering both Thorpe and Craig, and, after a penalty trial, was sentenced to life in prison without possibility of parole. When called to testify at Silva's trial, Shelton

asserted his fifth amendment rights against self-incrimination. Although the trial judge ruled that Shelton's privilege no longer applied -- since he testified at this first trial and, in any event, had already been convicted -- the trial court declined to hold Shelton in contempt or invoke further punitive measures in light of Shelton's extant unparolable life sentence.

2. Procedural History.

Silva's conviction was affirmed by the California Supreme Court and, following two state habeas petitions and denial of certiorari review of the second petition, Silva filed a federal habeas corpus action in this Court in June 1990. As he had been throughout the state appellate proceedings, Silva was represented by Emery Allen, who had transferred to the State Public Defender's office during the litigation of Silva's second habeas petition. Following an answer and traverse, the pleadings were closed at the end of August 1990.

Soon thereafter, Silva requested discovery and an evidentiary hearing, both of which were denied after a

hearing in February 1991. Two months later, in April 1991, the Court issued a tentative opinion denying the writ. The parties filed briefs regarding the Court's tentative opinion and a hearing on the tentative opinion was scheduled for late May 1991.

Ten days before the scheduled hearing, the State Public Defender filed a motion to withdraw as counsel of record, claiming it had a conflict of interest in that it had previously represented Shelton during Shelton's appeal. The Court denied the motion to withdraw, denied reconsideration, and Silva petitioned the Ninth Circuit for a writ of mandamus. Two months later, in mid-July 1991, after appellate briefing on the issue, the Ninth Circuit issued the writ of mandamus directing this Court to allow the State Public Defender to withdraw.

New counsel for Silva was not located until May 1992, when Phil Trevino was appointed as counsel of record. At Trevino's request, Michael Brennan was appointed as second counsel on June 10, 1992.

In October 1992, new counsel Trevino and Brennan filed a request for investigative funds and a motion for discovery. The investigative funds application was denied and, after briefing and a hearing, the Court denied the requested discovery as well. In February 1993, new counsel filed a second amended petition for writ of habeas corpus. The second amended petition incorporated by reference the first amended petition and raised two new basic issues -- the constitutional vagueness of the California death penalty statute and a host of new allegations of ineffective assistance of trial counsel. The pleadings were closed by May 1993, but exhaustion questions were raised by the Attorney General and conceded by Silva. The Court authorized Silva to return to state court to exhaust the newly presented claims. The state court denied the third state habeas petition on the merits within a month and the pleadings on the previously-unexhausted claims were closed at the end of October 1993.

While the pleadings were still open, in September 1993, Silva filed a renewed request for an evidentiary hearing. The request incorporated by reference the evidentiary hearing request filed by prior counsel and addressed the new claims which Petitioner believed merited an evidentiary hearing. This request was denied by minute order on September 15.

At the beginning of November 1993, Silva filed an application to add one additional claim, Claim Y. The proposed amendment added a claim that was also currently pending before the United States Supreme Court and the amendment was unopposed by the Attorney General. The Court approved the proposed amendment a few days later.

The Court then scheduled this case for a hearing on the merits and performed additional research with regard to the new claims. After an informal conference, Silva's attorneys requested the opportunity to re-present their prior discovery and evidentiary hearing requests. This Court granted this request and on March 21, 1994

petitioner filed a supplemental memorandum of points and authorities in support of previously filed motions for discovery and an evidentiary hearing. An opposition was filed on April 15, 1994. On May 31, 1994 the Court granted a limited evidentiary hearing on Claims A, B, X (sub-paragraphs 1, 3, 10, 13, and 14) and X.6 and X.7 as they relate to Thomas's burglary charge, probationary status, and plea arrangements re psychiatric examination. The Court denied an evidentiary hearing as to all other claims, deferred ruling on Claim W, and denied Claim Y on the merits.

On November 30, 1995 this Court delineated the scope of discovery to be had in the case, allowing Attorney Thomas Buckwalter to be questioned on what steps he took to attack the competency or credibility of prosecution witness Norman Thomas. In the same order the Court denied Petitioner's renewed motion for the appointment of a Strickland expert.

On April 30, 1996 this Court, in accordance with a stipulation submitted by the parties, ordered that the

record be closed on the issues before the Court pursuant to the grant of the evidentiary hearing without the taking of any live testimony. The parties submitted various items and materials to be added to the record, and to be considered by the Court for the purposes of the evidentiary hearing.

Prior to the due date set for the briefing on the claims to be considered pursuant to the evidentiary hearing, the Attorney General filed its Position on Retroactivity of New Legislation and therein requested that this Court vacate its order granting an evidentiary hearing. An opposition was filed on May 23, 1996, and a reply was filed on June 4, 1996. This motion is presently before this Court.

Discussion

1. Pre-Act Standard Governing Motion for Evidentiary Hearing.

This Court granted an evidentiary hearing based upon the standards set forth in the relevant case law prior to the passage of the Antiterrorism and Effective

Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, (the "Act"). The prior standard for determining when an evidentiary hearing should be held in a federal habeas corpus proceeding was set forth in Townsend v. Sain, 372 U.S. 293 (1963) *overruled in part*, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). Under Townsend, a petitioner is entitled to an evidentiary hearing on a habeas claim when he (1) "alleges facts which, if proved, would entitle him to relief" and (2) if he "did not receive a full and fair evidentiary hearing in state court, either at the time of trial or in a collateral proceeding." Id. at 312. The decision to grant an evidentiary hearing generally rests within the sound discretion of the Court. However, Townsend set forth six circumstances when the Court must grant an evidentiary hearing on a habeas claim:

1. The merits of the factual dispute were not resolved in the state hearing;

2. The state factual determination is not fairly supported by the record as a whole;

3. The fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;

4. There is a substantial allegation of newly discovered evidence;

5. The material facts were not adequately developed at the state court hearing;

6. Or for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing. Townsend, 372 U.S. at 313.

In setting forth the standard for granting an evidentiary hearing in federal habeas proceedings, the Townsend court recognized the importance of a hearing in determining a petitioner's claims. The court noted that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of factual issues." Id. at 312. Townsend also noted that the Supreme Court "has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." Id. at 316.

In analyzing whether the cause of the failure to adequately develop the facts in state court rested with the petitioner, identified as factor five, the Townsend court used the standard of "deliberate bypass" from Fay v. Noia, 372 U.S. 391 (1963). However, in Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715 (1992), the Supreme Court adopted a different test: the stricter "cause and prejudice" standard used in procedural default cases. The Court saw the failure of a petitioner to develop the factual basis of a claim in state court as similar to a petitioner who defaults a claim under a state procedural rule. The Court felt that a petitioner should not be excused for a "negligent failure to introduce any evidence of his own to support a constitutional claim." Id. 504 U.S. at 8-9. However, a petitioner could still get a hearing if he could show that a "fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Id. at 11.

2. Post-Act Standard Governing Motion for Evidentiary Hearing.

The basis asserted by the Attorney General for vacating the order granting an evidentiary hearing is the changes made to 28 U.S.C. § 2254(e) by the Act. The modified 28 U.S.C. § 2254(e)(2) states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -
>
> (A) the claim relies on -
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered

through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The modification of § 2254(e)(2) appears to be a codification of the Tamayo-Reyes holding, i.e., that an evidentiary hearing shall not be granted if petitioner fails to develop the facts of his claims in state court and fails to show cause and prejudice or a fundamental miscarriage of justice to excuse the failure. Tamayo-Reyes, 504 U.S. at 8-11 (emphasis added). Congress must have found that such a codification was necessary because Tamayo-Reyes was a 5 to 4 decision, with a fairly strong dissent written by Justice O'Connor, and joined by Justice Blackmun, Justice Stevens, and

Justice Kennedy. In addition, Justice Kennedy filed a separate dissenting opinion.

However, the Act is silent as to the remaining factors of Townsend; as Tamayo-Reyes only addressed the fifth circumstance under Townsend. Id. 504 U.S. at 4. The Ninth Circuit also clearly reads Tamayo-Reyes as holding that "a hearing is not mandatory under *Townsends' fifth* circumstance ('the material facts were not adequately developed at the state court hearing') unless the petitioner can show cause for failing to develop the material facts in state court and prejudice resulting therefrom." Chacon v. Wood, 36 F.3d 1459, 1466 (9th Cir. 1994). The Ninth Circuit went on to state that "[b]oth the *Tamayo-Reyes* opinion and Justice O'Connor's dissent suggest that, as is evident from the very nature of the various *Townsend* circumstances, the cause-and-prejudice rule imposed by *Tamayo-Reyes* applies principally to cases in which the petitioner seeks an evidentiary hearing on the basis of *Townsend's* fifth circumstance." Id. (internal citations omitted). The

court went on to find therefore that the cause and prejudice test of *Tamayo-Reyes* did not apply when a hearing is requested the fourth circumstance of *Townsend*. Id.

This silence strongly suggests that the Act was not intended to overrule Townsend. The Act specifically provides for one circumstance when a federal court may not hold an evidentiary hearing, it does not otherwise restrict when a court may hold one. Therefore, a federal petitioner would still be entitled to an evidentiary hearing if he did not receive a full and fair hearing in state court. In other words, the other Townsend factors would still form a basis for the order of an evidentiary hearing.

The Act does clearly modify the presumption of correctness afforded to state court factual determinations. See 28 U.S.C. § 2254(e)(1). The former 28 U.S.C. § 2254(d) contained eight factors, which dictated when a state court factual finding would not be entitled to a presumption of correctness. These

factors were removed under the new amendments. However these eight factors did not control when an evidentiary hearing was necessary.

As stated by the Supreme Court:

> it is evident that [the former] § 2254(d) does not codify *Townsend*'s specifications of when a hearing is required. *Townsend* described categories of cases in which evidentiary hearings would be required. Section 2254(d), however, does not purport to govern the question of when hearings are required; rather, it lists exceptions to the normal presumption of correctness of state-court findings and deals with the burden of proof where hearings are held. The two issues are distinct, and the statute indicates no assumption that the presence or

absence of any of the statutory exceptions will determine whether a hearing is held.

Tamayo-Reyes, 504 U.S. at 10, fn. 5.

Therefore the fact that the eight factors were replaced by a stricter presumption of correctness, and what appears to be a codification of Tamayo-Reyes does not change the analysis of a need for an evidentiary hearing. This is made even more clear by the language in 2254(e)(1) which now governs when the factual presumption of correctness applies. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." It makes logical sense that the only opportunity that an applicant would have to rebut the presumption would be in an evidentiary hearing.

The very next line of the statute then sets forth the one instance in which the court cannot hold an

evidentiary hearing. As pointed out by respondent, this instance arises when "the applicant has failed to develop the factual basis of a claim in state court proceedings," and the applicant has not satisfied the requirements under § 2254(e)(2). Although the amendments strengthen the presumption of correctness afforded to state court findings, this would affect the burden of proof accorded to the parties for issues litigated at an evidentiary hearing. The other Townsend factors, which do not appear to be overruled by the Act, focus on whether a full and fair hearing was held in state court. Indeed the need for a full and fair hearing, whether in state or federal court, was the main rationale behind the decision in Townsend.

It is true however, that if the Act is read literally, a hearing does not seem to be required for the presumption of correctness to attach to state court findings of fact. Specifically § 2254(e)(1) states that "[i]n a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the

judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." In comparison, the former statute specified that a presumption of correctness applied to "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceedings to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, . . ." 28 U.S.C. § 2254(d) (1948), *amended by* 28 U.S.C. § 2254(e)(1) (1996) (emphasis added).

Nevertheless, it is difficult to envision how a state court could make a determination of fact without some kind of hearing and have that finding bind a federal court's determination of federal constitutional issues. Therefore, the Act should not be read as taking away this Court's power to order an evidentiary hearing when there has not been a full and fair hearing in state court,

unless the petitioner has failed to develop the claims in state court.

3. Application of 28 U.S.C. § 2254(e)(2)(A) To This Case.

The question before the Court is whether the Act precludes the Court from holding an evidentiary hearing in petitioner's case. The answer is that it does not.

As discussed above, the Act envisions a hearing in federal court if petitioner did not receive a hearing in state court and the failure to develop the claim in state court was not a result of petitioner's "negligent failure to introduce any evidence of his own to support a constitutional claim." Tamayo-Reyes, 504 U.S. at 8-9. The Act did not change the law governing evidentiary hearings, instead it merely codified the decision of Tamayo-Reyes to ensure that a controversial five to four decision by the Supreme Court would be consistently followed. Since the new amendment was a codification of Tamayo-Reyes, petitioner's argument that "'failed to develop' ... only be understood as contemplating a

volitional choice evidenced by the petitioner's conduct of the litigation in the State court," is rejected. Clearly the standard is not whether the failure was volitional; rather even a negligent failure can bar the claim from being presented in an evidentiary hearing in federal court. Tamayo-Reyes, 504 U.S. at 8-9. However petitioner's second point, that the failure to develop bar "cannot apply to a litigant who, by state law provision and order, is precluded from developing the facts underlying his claims while still in that forum" has merit.

This Court granted an evidentiary hearing on some of petitioner's claims because he did not receive a hearing on those claims in state court. The Attorney General has failed to establish that petitioner "failed to develop the factual basis" of the claims subject to the evidentiary hearing. The Attorney General argues that the facts in support of petitioner's claims are being developed for the first time in federal proceedings. However, when a state prisoner files a state habeas petition, he cannot fully develop the factual basis of the

petition until the state court issues an order to show cause, which then entitles the petitioner to discovery and to other fact-finding processes of the court. Here petitioner was not allowed to obtain discovery and was not granted a hearing in state court, either of which would have allowed petitioner to develop his claims. Petitioner further asserts that judicial intervention was necessary to obtain the cooperation of trial counsel. Therefore no showing has been made that petitioner failed to develop the facts of his claims.

What is of paramount importance to the issue before this Court is that the amendment to 28 U.S.C. § 2254(e) merely codified pre-existing case law and did not change the standards which were applied when the evidentiary hearing was originally granted. So the fact that now respondent takes the position that petitioner failed to develop this claim in state court is of no consequence as this was already the law under Tamayo-Reyes when the parties submitted their supplemental briefing on the motion for an evidentiary

hearing. In other words, the modification of 28 U.S.C. § 2254(e) has not changed the standard governing the need for an evidentiary hearing or the Court's duty or discretion to order such a hearing.

4. Application of 28 U.S.C. § 2254(e)(2)(B) To This Case.

Since the Court has found that the amendment to 28 U.S.C. § 2254 did not change the standards governing the need for an evidentiary hearing, the Court does not need to decide whether 28 U.S.C. § 2254(e)(2)(B) must be read literally, so that if the petitioner failed to develop the claim in state court, he must then also show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B) (emphasis added).

However this Court points out that this portion of the amendment clearly appears to be a codification of

the portion of the Tamayo-Reyes holding wherein the Supreme Court stated that if a petitioner failed to properly develop the claim in state court, the claim could still be reviewed if the petitioner "can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." Tamayo-Reyes, 504 U.S. at 11.

This amendment is contained in the provisions which are applicable to all federal habeas cases, both capital and non-capital. However, the Supreme Court has applied the "miscarriage of justice" exception involving constitutional errors in the capital sentencing context. Sawyer v. Whitley, 505 U.S. 333 (1992). In so doing, the Supreme Court rejected the notion that the miscarriage of justice standard for death sentencing errors required petitioner to "negate an essential element of the offense." Id. 505 U.S. at 343. Such a requirement is "too narrow" and "contrary to the statement in Smith that the concept of 'actual innocence' could be applied to mean 'innocent' of the

death penalty." Id. (quoting Smith v. Murray 477 U.S. 527, 537, (1986)). Instead, under the Sawyer formulation, the actual innocence exception applies when the "petitioner has shown by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under the applicable state law." Id. 505 U.S. at 336, 348; see also Clark v. Lewis, 1. F.3d 814, 821 (9th Cir. 1993) ("[i]n a capital case, 'actual innocence' can mean innocent of the death penalty."). Pursuant to Sawyer, the miscarriage of justice standard "must focus on those elements which render a defendant eligible for the death penalty" and must take into account "the applicable state law." Sawyer, 505 U.S. at 336, 347-48. This is in harmony with the reading given to § 2254(e)(2)(B) by the petitioner.

5. Retroactivity of 28 U.S.C. § 2254(e).

This Court does not have to address the retroactivity of 28 U.S.C. § 2254(e) because whether or not it applies, there is no substantive change to the

standards governing the grant of evidentiary hearings. In other words, the amendment is a codification of pre-existing case law which was controlling case law when this Court originally granted the evidentiary hearing. Since the amendment effected no real change, whether it is applied to this case or not is of no consequence.

6. The Ex Post Facto Argument and the Due Process Argument.

Since an examination of the amendment at issue reveals that there is no substantive change in the standards utilized to determine whether an evidentiary hearing should be granted, the Court does not need address Silva's arguments that the Ex Post Facto Clause would prohibit the application of the Act to pending cases, or that application of the Act would result in a violation of due process.

7. The Motion to Vacate the Order Granting the Evidentiary Hearing is Denied.

This Court finds that the amendments to 28 U.S.C. § 2254(e) are simply a codification of the pre-existing case law, which was in effect at the time the evidentiary hearing was granted and therefore the standards have not changed. Therefore, § 2254(e) does not provide a basis for this Court to rescind its order granting petitioner an evidentiary hearing on petitioner's ineffective assistance of counsel claims.

IT IS SO ORDERED.

Dated: June 24, 1996.

Dickran Tevrizian, Judge
United States District Court